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September 14, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: **Worker Appeal**

Case Number: **TIA-0090**

Date of Filing: **April 27, 2004**

XXXXX (the worker or the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The worker was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the worker's illnesses were not related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the worker filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) provides various forms of assistance or relief to workers currently or formerly employed by the nation's atomic weapons programs. See 42 U.S.C. §§ 7384, 7385. This case concerns Part D of the Act, which provides for a program to assist DOE contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. The DOE has issued regulations to implement Part D of the Act, hereinafter referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE's program implementing Part D is administered by OWA.

Generally, if a physician panel issues a determination favorable to the employee, OWA accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. For those applicants who receive an unfavorable determination, the Physician Panel Rule provides an appeal process. Under this process, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review

certain OWA decisions. 10 C.F.R. § 852.18. The present appeal seeks review of a negative determination by a Physician Panel that was accepted by OWA. 10 C.F.R. §852.18(a)(2). 10 C.F.R. § 852.18(c) states that an appeal is governed by the OHA procedural regulations set forth at 10 C.F.R. Part 1003. The applicable standard of review is set forth at 10 C.F.R. § 1003.36(c), which provides that "OHA may deny any appeal if the appellant does not establish that – (1) the appeal was filed by a person aggrieved by a DOE action; (2) the DOE's action was erroneous in fact or law; or (3) the DOE's action was arbitrary or capricious." 10 C.F.R. § 1003.36(c).

B. Factual Background

The worker was employed by a DOE contractor at the K-25 Plant in Oak Ridge, Tennessee, at various times from 1971 through 1975 or 1976. Record at 9. The applicant submitted a claim to the OWA. As part of the application process, the applicant completed an OWA Form entitled "Request for Review by Physician Panel." Question 9 of that form asks "What diagnosed illness(es) do you have that you believe to be caused by your work at a DOE facility?" Record at 1. The applicant responded: "double amputee, lung problems, stroke." *Id.*

The OWA reviewed and prepared the case file and then forwarded it to the Physician Panel. The cover sheet to the case file identified three claimed illnesses: "bilateral amputee 1998, lung problems 1998, stroke 1996." The Physician Panel reviewed the case file and issued a report in which it found

> [The worker] reports that in 1973 at the age of 29 he developed a blister on the sole of his [right] foot, which took months to heal. He claims that that incident resulted in a bi lateral amputation of his legs. No documentation is supplied as to his alleged bilateral amputation, or the reasons for such a procedure. Notes from his [personal physician] state[] that he has a fungal infection of the [right] foot on the sole. No involvement of the [left] foot is suggested. [The worker] states that he started to smoke in his 60's, and smoked about ½ pack per day. He also suffered a stroke, but the age and degree of the stroke are not certain due to lack of documentation.
>
> There is not enough documentation or information to support the claim of work relatedness of the double amputation.
>
> * * *
>
> There is no documentation of any lung disease or exposure to have caused any lung disease. There is a single incident recorded when he was seen in the medical department for [an] inhalation, after he was exposed to HF, and he "breathed some" he was treated and released. He has documented normal [chest X-rays] in 1970 and 1973. No other information is provided.
>
> * * *

> [The worker] is claiming a stroke, however, once again there is no documentation of the alleged stroke, or that he is or has suffered any residual impairment.
>
> He does have a history of at least mild hypertension. With his leg amputation, it is more likely he suffers some form of [peripheral vascular disease] that may have contributed to his [stroke].
>
> At present there is no evidence of any work related exposure that may have caused or contributed to his condition.

Determination at 1-5. On April 27, 2004, the applicant appealed that determination.

II. Analysis

Under Part 852, "[w]hether a positive or favorable determination is rendered is to be based solely on the standard set forth [at 10 C.F.R.] § 852.8." 67 Fed. Reg. 52850 (August 14, 2002). That regulation states:

> A Physician Panel must determine whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility on the basis of whether it is as least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue.

10 C.F.R. § 852.8. The preamble to Part 852 states "[t]he DOE intends that, as used in this context, the word 'significant' should have its normal dictionary definition and meaning –that is, 'meaningful' and/or 'important'." 67 Fed. Reg. 52847 (August 14, 2002).

The record supports the Physician Panel's finding that the applicant has not shown he had any exposure to a toxic substance while working at the K-25 Plant that was a significant factor in aggravating, contributing to or causing the amputation of his legs, lung problems, or his stroke. The record notes that the worker was exposed to "multiple contaminants." *Id*. at 13; see also 46-149 (Site Profile). However, there is no evidence that any work-related exposures caused his illnesses. Accordingly, the Panel's finding under 10 C.F.R. § 852.8 that there is no link established between the worker's exposure at Oak Ridge and his three medical problems is neither erroneous nor arbitrary or capricious.

When OHA contacted the worker in connection with his appeal, he maintained that he had been burned on both feet, and he stated that he has obtained additional exposure data and medical records that were not available for review by the Physician Panel that considered his case. Memo of Telephone Conversation on September 9, 2004 between

the worker and Thomas O. Mann, OHA. The case file does contain evidence that the worker's personal physician diagnosed him with an ulcer on his right foot, "apparently fungus in nature," during his employment at Oak Ridge. Record at 202. But the worker's claim that he sustained burns on both feet that led to his retirement on disability, is not documented in the medical records reviewed by the Panel. This does not amount to a showing of error in the Panel determination that is the subject of the present appeal, but it may warrant further panel review, as explained below.

III. Conclusion

The applicant has not demonstrated any error in the Panel's determination. Consequently, there is no basis for an order remanding the matter to OWA for a second Panel determination. Accordingly, the appeal should be denied.

The worker's possession of new information not considered by the Panel that rejected his initial claim does not constitute grounds for granting the appeal and remanding the matter to the OWA. However, the worker may submit this information to the OWA and ask for further Panel review.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0090 be, and hereby is, denied.

(2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 14, 2004